National Labor Relations Board



Weekly Summary of NLRB Cases

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Catskill Mountain Mechanical Corp. and its alter ego, Plant Maintenance Services, Inc. (3-CA-26213; 352 NLRB No. 101) West Coxsackie, NY June 30, 2008. The Board denied the General Counsel's motion for summary judgment and remanded the proceeding to the Regional Director. The General Counsel argued that the Respondents failed to answer the essential complaint allegations, by failing to specifically deny or explain in their amended answers each of the complaint allegations. The Board noted that the Respondents' original answers sufficiently deny or deny knowledge of each of the unfair labor practice allegations and that there is no evidence that the Respondents' amended answers were intended to replace their original answers in their entirety or that, as the General Counsel contended, the Respondents intended to withdraw their original answers. The Board decided that the Respondents' original and amended answers should be taken together, and, in combination, they deny with sufficient specificity the allegations in the complaint and accordingly, raise questions of fact and law that require resolution through a hearing before an administrative law judge. [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

Charge filed by Iron Workers Local 12; complaint alleged violation of Section 8(a)(1) and (3). General Counsel filed motion for summary judgment April 8, 2008.

Cimato Brothers, Inc. and Cimato Brothers Construction, Inc. (3-CA-25918; 352 NLRB No. 99) East Amherst, NY June 30, 2008. The Board reversed the administrative law judge's findings that Respondents Cimato Brothers, Inc. and Cimato Brothers Construction, Inc. violated Section 8(a)(5) and (1) of the Act by failing to apply the terms of multiemployer collective-bargaining agreements with the Union to the employees of Cimato Brothers Construction, Inc., dealing directly with employees of Cimato Brothers Construction, Inc., and failing to respond to an information request addressed to Cimato Brothers Construction, Inc. regarding the relationship between the Respondents. [HTML] [PDF]

The judge found that Cimato Brothers, Inc. was bound to collective-bargaining agreements with the Union as a result of its delegation of bargaining authority to a multiemployer association. The judge found further that the Respondents are a single employer and that Cimato Brothers Construction, Inc. was obligated to recognize the Union and to abide by the terms of the collective-bargaining agreements as a result of the single-employer relationship. Alternatively, the judge found that, even assuming *arguendo* the Respondents are not a single employer, Cimato Brothers Construction, Inc. voluntarily recognized the Union and consented to be bound to the collective-bargaining agreements by its conduct of paying its union-member employees prevailing wages and submitting remittance reports, employee fringe benefit fund contributions and dues to the Union.

In reversing the judge, the Board found that the General Counsel did not adduce sufficient evidence of the factors traditionally relied on by the Board to support a single employer finding. The Board also found that the conduct of Cimato Brothers Construction, Inc., viewed as a whole, was insufficient to establish that it voluntarily consented to be bound to the collective-bargaining agreements. The Board observed, for example, that Cimato Brothers

Construction, Inc. did not apply the collective-bargaining agreements to employees who were not union members, and it dealt directly with both member and nonmember employees regarding wages and benefits. The Board also observed that the company consistently maintained that it is not bound to any collective-bargaining agreements with the Union. Finally, the Board observed that there is no evidence that the company has held itself out as a union-signatory contractor in order to obtain work. The Board thus concluded that the Respondents did not violate the Act under either of the theories relied on by the judge, and it dismissed the amended complaint in its entirety.

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Operating Engineers Local 17; complaint alleged violations of Section 8(a)(1) and (5). Hearing at Buffalo, April 23-24, 2007. Adm. Law Judge Michael A. Rosas issued his decision July 18, 2007.

Foxwoods Resort Casino (34-RC-2230; 352 NLRB No. 92) Norwich, CT June 30, 2008. The Board, affirming the administrative law judge, overruled the Employer's election objections and certified the UAW, as the representative of a unit of licensed casino dealers. The tally of ballots showed 1,289 for and 852 against the Union, with 36 non-determinative challenged ballots. [HTML] [PDF]

About 446 unit employees have Chinese surnames and were born in mainland China, Hong Kong, or Taiwan. Before the election, the Employer requested that the ballots and Notice of Election be translated into two forms of Chinese. The Regional Office declined to translate the ballots, but did translate the Notice of Election into traditional Chinese. The Employer argued that the Region's failure to make the requested translations, as well as alleged flaws in the traditional Chinese version of the Notice of Election, warranted setting aside the election. The judge overruled the Employer's objections, emphasizing that unit employees are required to speak English in order to be hired and that the Employer had provided campaign materials in multiple languages, including traditional and simplified Chinese, that explained the voting process to employees. The judge concluded that the Employer failed to establish that any significant number of Chinese-born unit employees had such difficulty reading and understanding English that the failure to make the requested translations could have affected the election. Citing *Bally's Atlantic City*, 352 NLRB No. 51 (2008), the Board adopted the judge's findings.

The Board also overruled the Employer's objection that agents of the Union engaged in objectionable listkeeping. The Employer contended that a prounion employee stood in the employee cafeteria on election day and made it known that she was keeping a list of which employees had voted and how they had voted. The employee was a member of the Union's employee organizing committee, a group of about 105 employees who spoke to co-workers about the Union, distributed literature, and met with union representatives during the campaign. Assuming arguendo that the employee engaged in objectionable listkeeping, the Board found

that the Employer failed to prove that she was a union agent. The Board reasoned that the Union's representatives maintained a substantial presence throughout the campaign; that the record contained a paucity of evidence about the alleged agent's specific activities; and that the Board has found activities such as distributing literature, soliciting signatures on authorization cards, and talking to fellow employees about unionization insufficient to make employees general agents of the union. The Board noted that the Employer did not contend that the employee's conduct would warrant setting aside the election if she were not a union agent.

(Chairman Schaumber and Member Liebman participated.)

Loyalhanna Health Care Associates t/d/b/a Loyalhanna Care Center, a Pennsylvania Limited Partnership (6-CA-28609, et al.; 352 NLRB No. 105) Latrobe, PA June 30, 2008. In this case, the Board reviewed the administrative law judge's supplemental decision and order on remand, which applied the standards for supervisory status set forth in Oakwood Healthcare, Inc., 348 NLRB No. 37 (2006) and its progeny, and found that three nurse manager employees are not statutory supervisors. In particular, the Board found that the Respondent failed to show, by a preponderance of the evidence, that the nurse managers exercise independent judgment while purportedly assigning and responsibly directing other employees. Having found no demonstration of independent judgment, the Board found it unnecessary to pass on the judge's findings that the nurse managers possess the authority to responsibly direct, but not to assign, other employees. In addition, the Board rejected the Respondent's: reliance on the nurse managers' job descriptions and on the fact they are the highest-ranking employees on duty at the facility during certain periods; claim that the burden should have shifted to the General Counsel to produce affirmative evidence that the nurse managers are not supervisors; and claim that the nurse managers have the authority to discipline other employees. [HTML] [PDF]

(Chairman Schaumber and Member Liebman participated.)

Adm. Law Judge Arthur J. Amchan issued his supplemental decision April 16, 2007.

Murrill Electric, LLC (28-CA-21503; 352 NLRB No. 96) Carlsbad, NM June 30, 2008. The Board found that the administrative law judge did not abuse his discretion in denying the General Counsel's motion to amend the complaint to allege that the Respondent maintained an unlawful policy forbidding wage discussion among employees. The General Counsel had moved to amend the complaint at the hearing after receiving a requested document from the Respondent and questioning the Respondent's witnesses. [HTML] [PDF]

No party excepted to the judge's dismissal of the allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider Shawn Doyle for hire because of his union activity and that the Respondent violated Section 8(a)(1) by disparaging the Union and by

threatening employees that they would not be considered for hire because of their union affiliation.

(Chairman Schaumber and Member Liebman participated.)

Charge filed by Electrical Workers IBEW Local 611; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Albuquerque on Jan. 15, 2008. Adm. Law Judge Gerald A. Wacknov issued his decision April 3, 2008.

Puget Sound Area Local 298, affiliated with the Postal Workers and the Postal Workers (APWU) (United States Postal Service) (19-CB-9568, 9593; 352 NLRB No. 98) Tacoma, WA June 30, 2008. The Board affirmed the administrative law judge's decision that the Respondent Unions violated Section 8(b)(1)(A) of the Act by distributing certain settlement moneys only to union members. [HTML] [PDF]

In 2003, Respondent Postal Workers ("APWU") entered into a settlement agreement with the Employer to settle grievances. The agreement included a provision that funds intended for former employees who could not be located would "be remitted to the local unions." However, the Employer, when asked to remit such funds, offered to pay a "greater total amount" if Respondent Local 298 would "waive its right to receive payment directly and instead designate employees for direct payment." The parties executed a new settlement agreement in 2006, which provided that "[c]urrent clerk craft employees," to be identified by the APWU Business Agent, would receive a lump sum payment. The Respondents divided the lump sum among only the unit employees who were members of Local 298.

The Board rejected the Respondents' assertion that Local 298 had a contractual right under the 2003 agreement to the funds distributed under the 2006 agreement and could lawfully assign such rights as it chose. The Board reasoned that the 2006 agreement modified the relevant provision of the 2003 agreement by providing for remittance of the settlement proceeds to the "[c]urrent clerk craft employees" rather than to "the local unions." The Board also found that even assuming that Local 298 retained a contractual right to the settlement moneys it was not free to assign such a right on the basis of union membership, citing *Steelworkers Local 2869 (Kaiser Steel Corp.)*, 239 NLRB 982, 982-983 (1978) *Stagehands Referral Service*, 347 NLRB No. 101, slip op. at 4 (2006); *United States Postal Service*, 345 NLRB 1203 (2005); and *District 65, Distributive Workers of America (Blume Associates, Inc.)*, 214 NLRB 1059 (1974).

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Li Eagle Ransom, an individual; complaint alleged violation of Section 8(b)(1)(A). The parties waived their right to a hearing. Adm. Law Judge Jay R. Pollack issued his decision Jan. 18, 2008.

SPE Utility Contractors, LLC (7-CA-49691, et al.; 352 NLRB No. 97) Port Huron, MI June 30, 2008. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with unit employees regarding an incentive program and recalling an employee to perform bargaining unit work. In affirming this finding, the Board noted that it relied upon the Respondent's failure to notify the Union of the incentive program after it received notice from the Union a few days after the Respondent verbally offered unit employees the incentive program but before the offer was reduced to writing. Further as the Board found that the Respondent engaged in unlawful direct dealing in this respect, it found it unnecessary to pass on whether the judge correctly recommended dismissal of a separate direct dealing allegation made by the General Counsel. [HTML] [PDF]

However, the Board did not adopt the judge's recommendation that the Respondent violated the Act by unilaterally laying off unit employee Linda Leuch before the parties had come to impasse. The General Counsel had alleged that Leuch's lay off was in violation of an agreement between the Respondent and the Union but did not allege that the Respondent violated the Act by laying off Leuch before the parties had bargained to impasse. The Board found that this unalleged theory of violation was not closely connected to the violation actually alleged and so reversed the judge's finding that the Respondent violated Section 8(a)(5) by laying off Leuch.

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Teamsters Local 339; complaint alleged violations of Section 8(a)(5) and (1). Hearing at Detroit, Aug. 8 and 9, 2007. Adm. Law Judge Arthur J. Amchan issued his decision Oct. 2, 2007.

Toering Electric Co. and Foster Electric, Inc. (7-CA-37768, et al.; 352 NLRB No. 102) Grand Rapids, MI June 30, 2008. On Sept. 29, 2007, the Board issued its Decision and Order in this proceeding, holding that an applicant for employment entitled to the Act's Section 8(a)(3) protections against hiring discrimination is "someone genuinely interested in seeking to establish an employment relationship with the employer." Toering Electric Co., 351 NLRB No. 18, slip op. at 4. The Board further held that the General Counsel must establish the applicant's genuine interest in employment as part of his prima facie case under FES, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). The Board then remanded the case to the judge for further proceedings consistent with the decision. [HTML] [PDF]

The Charging Party (IBEW Local 275) filed a Motion for Reconsideration of the Board's Order on Dec. 3, 2007. On March 7, 2008, in an unpublished Order, the Board denied the Charging Party's first Motion for Reconsideration. The Charging Party filed a second Motion for Reconsideration on April 7, 2008, reasserting arguments made in the first motion and, relying on *Wal-Mart Stores, Inc.*, 351 NLRB No. 17 (2007), asserting the new argument that the Board committed a material error by failing to specifically address whether retroactive application of *Toering Electric Co.* would result in a "manifest injustice" to the Charging Party. Considering

these arguments, the Board denied them as failing to present any extraordinary circumstances warranting reconsideration. The Board also denied the Respondent's request, made in its response to the Charging Party's second motion, for an award of attorney's fees against the Charging Party.

(Chairman Schaumber and Member Liebman participated.)

Wal-Mart Stores, Inc. (28-CA-16832, et al.; 352 NLRB No. 103) Kingman, AZ June 30, 2008. The Board adopted the administrative law judge's findings that the Respondent granted a benefit to employees by repairing the cooling system in the Tire and Lube Express (TLE) in violation of Section 8(a)(1) of the Act, discharged union advocate Brad Jones, denied Jones COBRA benefits, and disparately failed to enforce its no-harassment policy to protect employees Will Brooks and Greg Lewis from the harassing statements of employee Mitch Bowman in violation of Section 8(a)(3) and (1). [HTML] [PDF]

The Board also affirmed the judge's finding that the Respondent's threat to freeze discretionary merit wage increases during initial bargaining violated Section 8(a)(1), but reversed his finding that the Respondent unlawfully surveilled employees and created an impression of surveillance when it assigned Regional Personnel Manager Tom Scott to be the interim TLE manager.

The unfair labor practices began in the summer of 2000 when Food and Commercial Workers Local 99R began organizing the TLE employees at the Respondent's Kingman, AZ store. In response to a question placed in the Q&A box that the Respondent had set up—what would happen to raises while the employees were waiting on a contract—the Respondent posted a response stating that it would not be allowed to give them while negotiations continued. In finding that the Respondent unlawfully threatened to freeze wage increases, the Board noted that the judge erroneously relied on case law which prohibits employers from discontinuing existing benefits while an election is pending. Because the question posed by the employee focused on the postcertification period, the Board instead applied NLRB v. Katz, 369 U.S. 736 (1962), and *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997), which prohibit unilateral changes in terms and conditions of employment by employers whose employees are represented by a labor organization, and on Jensen Enterprises, 339 NLRB 877 (2003), in which the Board found that an employer may not unilaterally discontinue a practice of granting periodic wages increases following its employees' selection of an exclusive bargaining representative. The Board reasoned an employer's statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases because such an announcement suggests to employees that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back.

In reversing the judge's finding that the Respondent unlawfully surveilled the TLE employees and created an impression of surveillance when it assigned Scott to the TLE as interim manager despite his high rank and automotive inexperience, the Board applied *Sprain Brook Manor Nursing Home*, 351 NLRB No. 75 (2007), and found that even though Scott worked alongside TLE employees from opening to closing, there was no evidence that he engaged in any conduct that was out of the ordinary with respect to open union activity by employees. Additionally, given evidence that the long-time TLE manager Larry Eidson was on extended sick leave and the store was in disarray, the Board reasoned that employees would more likely have viewed Scott's temporary assignment to the TLE as a "stopgap" measure rather than as an effort to surveill their union activity.

(Chairman Schaumber and Member Liebman participated.)

Charges filed by Food and Commercial Workers Local 99R; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Kingman, June 11-14, Sept. 3-6, and 9-13, 2002; supplemental hearing at Phoenix, Nov. 30, 2006 and Feb. 2007. Adm. Law Judge Gregory Z. Meyerson issued his decision Feb. 28, 2003 and his supplemental decision March 30, 2007.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Nichols & Wright Paving, Inc. (Operating Engineers Local 132) Huntington, WV July 1, 2008. 9-CA-41612, 41729; JD(ATL)-20-08, Judge Michael A. Marcionese.

Kumi Manufacturing of Alabama, LLC (Auto Workers) Clanton, AL July 1, 2008. 10-CA-37006; JD(ATL)-21-08, Judge John H. West.

Stevens Creek Chrysler Jeep Dodge, Inc. (Machinists District Lodge 190, Machinists Local 1101) San Jose, CA July 1, 2008. 20-CA-33367, et al.; JD(SF)-26-08, Judge Jay R. Pollack.

NO ANSWER TO COMPLAINT AND COMPLIANCE SPECIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint and compliance specification.)

Convalcare Corp. d/b/a Stockbridge Country Manor (SEIU Healthcare Michigan) (7-CA-51070; 352 NLRB No. 104) Stockbridge, MI June 30, 2008. [HTML] [PDF]

TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in the unfair labor practice proceeding.)

San Miguel Hospital Corp. d/b/a Alta Vista Regional Hospital (Hospital and Healthcare Employees District 1199NM) (28-CA-21896; 352 NLRB No. 100) Las Vegas, NV June 30, 2008. [HTML] [PDF]

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

DECISION AND ORDER [that Regional Director open and count ballot]

Propark America West, LLC d/b/a Expresso Airport Parking, San Leandro, CA, 32-RC-5554, July 2, 2008 (Chairman Schaumber and Member Liebman)

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF REPRESENATATIVE

Home Depot Home Services Bath Remodeling Group, Inc., St. Paul, MN, 18-RC-17558, July 2, 2008

DECISION AND ORDER [remanding proceeding to Regional Director for further appropriate action]

Tomra Pacific, Inc., Rancho Cucamonga and Los Angeles, CA, 21-RC-21040, July 2, 2008

ORDER AND DIRECTION [that Regional Director open and count challenged ballots]

George Fern Co., Cincinnati, OH, 9-RC-18197, July 2, 2008

DECISION AND DIRECTION[that Regional Director open and count ballots]

First Student, Inc., Old Lyme, CT, 34-RC-2250, June 30, 2008

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

El Rio Santa Cruz Neighborhood Health Center, Tucson, AZ, 28-RD-965, July 2, 2008 (Chairman Schaumber and Member Liebman)

Weyerhaeuser Co., Salem, OR, 36-RC-6413, July 1, 2008 (Chairman Schaumber and Member Liebman) [amending decision to permit maintenance employees to vote under challenge]
